Big Data and Competition Policy: A US FTC Perspective

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(Views set forth herein are solely attributable to me)

Introduction

- Delighted to be here today, my thanks to Professor Christopher Yoo for having invited me, as well as to the three cosponsoring institutions, the University of Pennsylvania Law School's Center for Technology, Innovation, and Competition; the Universität Mannheim; and the University of International Business and Economics.
- The views expressed today are my own, they are not attributable to the Federal Trade Commission or any Federal Trade Commissioner.
- Today I will discuss the FTC's enforcement approach with regard to "big data," and comment on the way in which U.S. competition law agencies approach matters having a "big data" component.

Big Data: The Big Picture

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The Big Picture, continued

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Big Picture, continued: Monopoly Leveraging

- U.S. antitrust law does not recognize a standalone monopoly leveraging offense, i.e., use of monopoly in one market to gain competitive advantage in a second market.
- In a leveraging scenario involving a monopolist, US law finds no violation unless monopoly is seriously threatened (there must be a “dangerous probability of success” in monopolizing second market, *Verizon v. Trinko*).
- Many forms of “leveraging,” such as technological ties, can represent an efficient form of product intergration or product enhancement that benefits consumer and is therefore procompetitive. Thus, as a practical matter, monopoly leveraging highly is viewed most skeptically in the U.S.
- The EU and other jurisdictions find abuse of a dominant position in the first

Big Picture, continued – Remedies

- AS TO PROPOSED REMEDIES, note that legally mandated data access, data sharing, or data pooling involves significant administrative costs.
- There may be less incentive to develop a collection of data if it is likely that the collection will be subject to forced sharing. Mandatory sharing may also cause enhanced risks of cartelization.
- To the extent remedies are required to offset anticompetitive effects connected to the control of a set of data, those remedies should be narrowly tailored to specifically address the perceived harm.
- When antitrust does intervene, competition agency should ensure that (1) feasible remedies to address the competitive concern exist; and (2) those remedies do not pose their own prohibitive costs or other risks to the competitive process.
- Take care that any remedy does not lead to worse competitive outcomes, whether due to a chilling effect on incentives to innovate or due to the increased risk of collusion that

Special Aspects of Big Data and Platforms

- Specialized data related to personal information —

Data Issues in U.S. Merger Enforcement

- U.S. merger enforcers have examined data-related issues, examples below.
- For instance, in *Bazaarvoice* (2014), the Justice Department (DOJ) successfully challenged a 2012 consummated merger involving companies that provide software platforms for online ratings and reviews ("R&R") of products created by consumers that manufacturers and retailers host, share, distribute, and display. The court found a relevant market for R&R platforms, noted that the merging parties had called themselves duopolists in this market, and found that the merged firm likely would be able to charge monopolistic prices. In a settlement of the case, DOJ required Bazaarvoice to divest all of the assets it had acquired in 2012.
- And in a series of mergers involving entities with databases of public real estate records used for title insurance underwriting (called title plants), the FTC required the merging parties to sell a copy of their title plant.
- For other examples, *see* Sher & Yost, *US: Digital Platforms* (Ant. Rev. Am. 2019).

U.S. Merger Enforcement, continued

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U.S. Merger Enforcement, continued

- In 2015, DOJ sued to block Cox Automotive's acquisition of Dealertrack. Cox owns the AutoTrader and Kelley Blue Book brands.
- As part of its acquisition, Cox sought to purchase Dealertrack's inventory management solution business ("IMS") — a business unit devoted to providing analytics and algorithms to assist car dealers with the management of their vehicle inventory. DealerTrack also held ownership of valuable vehicle information data.
- DOJ was concerned that Cox would not only become an effective monopolist in the IMS market but also would acquire valuable vehicle information data that served as inputs to IMS businesses. With control over that data, Cox could "deny or restrict access" to the data "and thereby unilaterally undermine the competitive viability of Cox's remaining IMS competitors."
- To allow the deal to go through, DOJ not only required Cox to divest the IMS portion of Dealertrack's business, it also required Cox to enable the continuing exchange of data and content between the websites it owns and the divested IMS business.

U.S. Merger Enforcement, continued

- In *CDK/Auto-Mate* (2018), FTC sued to block a merger of two digital tech platforms where firms were current competitors, but one was a market giant—close to a duop to a

Monopolization and Big Data

- U.S. monopolization law can be applied when appropriate to counter anticompetitive actions (“exclusionary conduct”) involving big data
- Professor Hovenkamp, the leading U.S. treatise writer, concludes that exclusionary conduct involves acts that “are reasonably capable of creating,

More on (2001)

- D.C. Circuit found Microsoft violated Sherman Act § 2 by commingling computer code for its Windows operating system and its Internet Explorer (IE) web browser, requiring all Microsoft Windows purchasers to accept pre-installed version of Explorer as well.
- Since computer manufacturers did not want to support 2 versions of same program, effect of commingling was virtually to eliminate chief IE rival, Netscape, from original distribution part of browser market.
- This in turn made it much harder for Netscape to develop tools to make computers compatible with different operating systems, thus letting Microsoft inefficiently maintain its operating system monopoly.
- No plausible procompetitive justification for Microsoft's commingling.

Digital Platforms and Antitrust: Case

- In *Ohio v. American Express* (2018), the U.S. Supreme Court required examination of effects on both sides of AmEx's digital platform –

FTC Platform-Related Monopolization Case

- In April 2019, FTC sued health information company Surescripts (SS) in federal district court, alleging that the company employed illegal vertical and horizontal restraints in order to maintain its monopolies over two electronic prescribing, or “e-prescribing,” markets: routing and eligibility.
- E-prescribing provides a safer, more accurate, and lower-cost means to communicate and process patient prescriptions than traditional paper prescribing.
- FTC alleged SS monopolized two separate markets for e-prescription services: The market for routing e-prescriptions, which uses technology that enables health care providers to send electronic prescriptions directly to pharmacies; and the market for determining eligibility, a separate service that enables health care providers to electronically determine patients’ eligibility for prescription coverage through access to insurance coverage and benefits information.
- FTC asserted that SS intentionally set out to keep e-prescription routing and eligibility customers on both sides of each market from using additional platforms (a practice known as multihoming), using anticompetitive exclusivity agreements, threats, and other exclusionary tactics.
- Among other things, FTC alleged that SS took steps to increase the costs of routing and eligibility multihoming through loyalty and exclusivity contracts. According to the FTC’s complaint, SS successfully used these tactics to stop multiple attempts by other companies to enhance competition in the routing and eligibility markets.

Competition-Consumer Protection Issues

- Finally, what about interrelationship, if any, between competition and consumer protection concerns regarding big data?
- Sharing as a competition remedy has traditionally been invoked where data is difficult or expensive to create, raising an entry barrier that keeps out competitors who need access to such data. In the U.S., this has been imposed typically in a merger analysis, where two holders of such a data set want to combine (see previous discussion).
- By contrast, the concern driving privacy law, like the European Union's General Data Privacy Regulation, or GDPR, is that consumer data has become too widely available, with a perceived loss of consumer control. The GDPR's remedy adopted for privacy concerns limits collection and restricts sharing of data, except at the consumer's direction.
- Tension between competition and consumer protection approaches?

Competition-Consumer Protection: Update

- On July 23 DOJ announced it has opened a broad antitrust review of bit tech companies (WSJ – investigation was prompted by “new Washington threats” from Facebook, Google, Amazon, and Apple).
- On July 24 Facebook revealed it is under FTC antitrust investigation.
- Antitrust and consumer protection raise different issues/concerns.
  - For example, in July 24 press conference discussing settlement order between FTC and Facebook over Facebook’s defective privacy practices, an FTC staffer stressed that deceptive conduct at heart of this settlement implicated consumer protection concerns, not antitrust concerns.
- In February 2019 the German competition agency (BKT) held that Facebook abused its market dominance in Germany by conditioning use of its social network on the collection of user data from multiple sources, and ordered Facebook to change the way it collects data from German users.
  - In August 2019 the Higher Regional Court of Dusseldorf expressed “serious doubts about the legality” of this decision, and suspended it pending a final verdict – BKT is appealing.

Conclusion

- The new high tech platforms and their use of large collections of data raise major questions under both competition and consumer protection law, in multiple jurisdictions.
- My comments, which represent only my views, have only scratched the surface. Expect additional enforcement actions and policy development here.
- Big digital platforms raise various other important policy issues (of course), such as platforms' roles in mediating speech by users and the supervisory (or regulatory) role of government, that are beyond the scope of my presentation.